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THE RIGHT TO RETURN OF SECURITY DOCUMENTS — Whether Borrower entitled to return of Security Documents when loan contract held non-enforceable.

By

PETER GROGAN, B.A., LL.B., B.Ec.

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An interesting question of very practical importance arises when security documents are handed over by a borrower to a lender in accordance with, or as collateral to, a contract which is subsequently held to be non-enforceable. Is the borrower who is entitled to rely on the non-enforceability of the contract entitled also to have the security documents returned to him without being placed on terms by the court? This was one of the questions which arose in *White* v. *Pacific Acceptance Corporation Limited*[1] (*"White's Case"*) where it was held that the plaintiffs in the equity suit should not have an order for delivery up and cancellation of certain memoranda and securities "without having offered to do equity and without being put upon terms as to restoration".[2] MCLELLAND, C.J. in Eq., who heard *White's Case*, gave careful consideration to the judgment of the Privy Council in *Kasumu* v. *Baba Egbe*[3] (*"Kasumu's Case"*) and concluded that the effect of that judgment was to destroy the basis of the decisions in *Lodge* v. *National Union Investment Co. Limited*[4] (*"Lodge's Case"*) and *Langman* v. *Handover*.[5] His Honour, however, went on to refer to certain views expressed in *obiter dicta* by DIXON, C.J., in *Mayfair Trading Co. Pty. Limited* v. *Dreyer*[6] and decided to follow these views in preference to the clear ratio extracted from *Kasumu's Case* which was, technically, binding upon him. His Honour stated that he had come to the conclusion that he should adopt this course and "leave the situation to be clarified if this suit goes further".[7] This invitation has been accepted by both parties to the litigation: conditional leave to appeal to the Privy Council has been granted to the plaintiffs and an appeal to the Full Court of the Supreme Court of New South Wales has been lodged by the defendant.

In *Kasumu's Case* the Privy Council had before it a Nigerian moneylenders Ordinance containing a provision that a moneylender should not be "entitled to enforce any claim in respect of any transaction in relation to which" he had made default in complying with a requirement to keep a book and enter in it certain particulars of every loan. The lender did not keep the book as required by the Ordinance and the appeal was against an order which granted the borrower relief in the form of an order for repossession of mortgaged premises and delivery up of the mortgage deed and its accompanying title deeds. The

[1] [1961] N.S.W.R. 1154.
[2] [1961] N.S.W.R. at p. 1179.
[3] [1956] 3 All E.R. 266; [1956] A.C. 539.
[4] [1907] 1 Ch. 300.
[5] (1929), 43 C.L.R. 334.
[6] (1958), 101 C.L.R. 428 at pp. 450-452.
[7] [1961] N.S.W.R. at p. 1182.

ground of appeal was that the borrower should not have been given relief without being put on terms as to repayment of so much of the loan as was still outstanding. LORD RADCLIFFE delivered the judgment of the court, saying that the matter under appeal consisted essentially of a weighing of the authority of *Lodge's Case* against that of *Cohen* v. *J. Lester Limited*[8] (*"Cohen's Case"*). *Lodge's Case* concerned an equitable action by a borrower to recover securities mortgaged to an unregistered moneylender, the moneylending transaction in question being "void for illegality" by virtue of the non-registration of the lender under the English *Moneylenders Act*, 1900. PARKER, J., held that the borrower was not entitled to the return of the securities except upon terms as to repayment of such of the money borrowed as was still outstanding. In *Cohen's Case*, however, TUCKER, J., refused to impose any terms as to repayment when making an order for the return of a pledged chattel at the instance of a borrower, the contract and security being in that case rendered unenforceable by virtue of s. 6 of the *Moneylenders Act* 1927. The Privy Council in *Kasumu's Case* did not appear to consider that the distinction between a contract declared to be "illegal" and one declared to be "unenforceable" was significant for the solution of this problem, notwithstanding what is said in the head note in the Law Reports[9] and of the comment on the case by Mr. Megarry.[10]

LORD RADCLIFFE stated that *Lodge's Case* "cannot be treated as having established any wide general principle that covers the action of courts in granting relief in moneylending cases".[11] His Lordship then went on,[12] in clear and persuasive language, to express the principles which, it is submitted, were binding but not followed in *White's Case*:

"It remains for their Lordships to consider whether the principles of *Lodge's Case* ought to be applied in the case of a transaction declared to be unenforceable by s. 19 of the Nigerian Ordinance. In their opinion it should not. If it were, the result would be that a lender who, while offending against the Ordinance, had fortified himself by taking any sort of security would be put by the courts in a position altogether more favourable than a similar lender who had taken no security for his loan. For any lender who by taking security had put himself in the position that his borrower would have to resort to the court in order completely to undo the effect of the transaction would be protected by the court from parting with his security except on terms that rendered the unenforceable loan enforceable, either to its full effect or in some modified terms. Yet the lender who had taken no security would lose any right to recover his money, as the Ordinance clearly intended. Not only would it seem anomalous for the court to bring about a distinction of this sort between loans each of which equally offends the statute, but

[8] [1938] 4 All E.R. 188.
[9] [1956] 3 All E.R. 266; [1956] A.C. 539.
[10] (1956), 72 L.Q.R. 480.
[11] [1956] 3 All E.R. at p. 270.
[12] [1956] 3 All E.R. at pp. 271-2.

it would also be wrong that a lender in default should be allowed to defend himself in court by calling for the imposition of terms of repayment, for by so doing he would be enforcing, directly or indirectly, 'a claim in respect of the transaction'. . . . When the governing statute enacts that no loan which fails to satisfy any of these requirements is to be enforceable it must be taken to mean what it says, that no court of law is to recognize the lender as having a right at law to get his money back. That is part of the penalty which the statute imposes. There is no room to reform the terms of the loan, since the statute is not concerned with the vice of its content but with the vice of the conditions under which it was made. The provisions of s. 19 are not purposeless: they seem to assume that no loan that is not contemporaneously recorded can be established with sufficient certainty to be recognized at law. If a court therefore were to impose terms of repayment as a condition of making any order for relief it would be expressing a policy of its own in regard to such transactions which is in direct conflict with the policy of the Acts themselves. In their Lordships' opinion the court should not place itself in such a position."

In *Mayfair Trading Co. Pty. Limited* v. *Dreyer*,[13] the High Court considered a provision in the W.A. Moneylenders Act to the effect that no contract for the repayment by a borrower of money lent by a moneylender should be enforceable unless there had been compliance with the requirements of the Act. A borrower sought, amongst other things, a declaration that it was not liable to repay the amount of the loan since the transaction was unenforceable and an order for the delivery up for cancellation of certain promissory notes and other documents. It was held by DIXON, C.J., and MCTIERNAN, J., TAYLOR, J., expressing no opinion, that the borrower was entitled to the relief sought without being put on terms to repay to the moneylender the amount of the loan still outstanding. In so doing, DIXON, C.J., with whom MCTIERNAN, J., agreed, applied *Kasumu's Case*, remarking that notwithstanding the strength of the foundation upon which *Lodge's Case* had seemed to rest, "the effects of the decision may be taken to be largely undone by the judgment of the Privy Council"[14] in *Kasumu's Case*. After referring to the words of LORD RADCLIFFE which have been quoted above, DIXON, C.J., concluded that "it is difficult to escape the consequence that neither as a condition of relief nor otherwise"[15] could the borrower be required to repay the amount of the loan moneys remaining unrepaid.

It is clear that, following the *Mayfair Trading Co. Case*, the decision in *Kasumu's Case* will be accepted without reservation in all States of the Commonwealth except, possibly, N.S.W. In respect of the equitable jurisdiction of the Supreme Court of N.S.W. DIXON, C.J., uttered a caveat:[15]

"One may perhaps be permitted to believe that had the plaintiffs depended for relief upon an application to a court exercising an equitable jurisdiction and nothing else the same

[13] (1958), 101 C.L.R. 428.
[14] (1958), 101 C.L.R. at p. 453.
[15] (1958), 101 C.L.R. at p. 456.

result could not have ensued but, as it is, the defendant firm must lose the entire amount of the loan moneys lent to the plaintiff company which remained unpaid at the time when they proceeded to enforce their security by putting in the receiver."

In the course of his judgment, DIXON, C.J., emphasized the special nature of equitable relief:[16]

"In the Court of Chancery it was necessary for a plaintiff to show an equity to relief; otherwise he was not entitled to specific relief at the hands of that court but must rest content with whatever relief he could obtain at law, whether under the provisions of statute or at common law. What constituted an equity to relief was determined by the doctrines of equity. . . . Whatever remedies at law are given by or arise in consequence of the statute may, of course, be pursued by the party unconditionally. But something more would be required before a court of equity intervened on equitable grounds and so went further in point of remedy than the statute provided. There must be some ground, some particular situation, giving an equity to the party to the form of relief sought. In the case of the entry of the receiver and manager into possession in the present case, it might have been enough to found the equity to relief by injunction that the statute made the security unenforceable and that nevertheless the receiver entered and took possession. . . . But an equity entitling a party to the delivery up and cancellation of documents, or to an injunction against suing at law on a negotiable instrument or to some other kindred specific relief must rest on other grounds. In many situations something beyond the mere existence of a legal right was needed before a ground could be found for the intervention of a court of equity. The fact that the legislature has declared a particular transaction illegal or void does not in itself warrant a court of equity in improving upon or adding to what the legislature has done and to furnish its remedies on no other ground than that the mere existence and general character of the statute would be to do that. But rescission of the entire transaction and restitution of the parties so far as may be to the situation they initially occupied stands on a different footing. It is a form of relief administered by a court of equity and it may be appropriate to the situation in which the statute places the parties. If the party whom it is the purpose of the legislature to protect is prepared to do his part by restoring what he has obtained from the other party by means of the transaction, a court of equity may properly consider that an equitable title exists in him to the remedies which will result in remitting the parties to their former position so far as may be. Such a court may take the view that it is by submitting to this condition that the party makes out an equitable title to the relief of the court. Sometimes it is simply put that because he seeks equity he must do equity. . . . That is why the borrower must submit to the repayment of the moneys borrowed remaining unpaid. All this was explained in this Court in *Langman* v. *Handover*. That was

[16] (1958), 101 C.L.R. at pp. 450-452.

an appeal from a decision of the Supreme Court of New South Wales in its equitable jurisdiction. As the Judicature Act has not been adopted in New South Wales the equitable principles remain applicable by which a title to specific relief was governed in a court of equity: See *David Jones Ltd.* v. *Leventhal.*"

The essential ratio of *Langman* v. *Handover*[17] was, it is submitted, that the statement of claim was nothing more than a claim for the declaration of a legal right and that therefore the case was covered by *David Jones Ltd.* v. *Leventhal.*[18] This ratio is not affected by the decision in *Kasumu's Case.* However, in so far as *Langman* v. *Handover,* following the decision in *Lodge's Case,* is authority for the proposition that the borrower must offer to do equity and repay the outstanding loan moneys, it is extremely doubtful whether it can survive *Kasumu's Case* in relation to the position in N.S.W. In *White's Case,* the court was squarely faced by the problem of reconciling the authorities and it is possible that in reaching his decision His Honour applied inconsistent principles which he purported to extract from the judgment of DIXON, C.J., in the *Mayfair Trading Co. Case.*

White's Case concerned a suit by borrowers seeking equitable relief in respect of the enforcement of securities given under contracts for the loan of money. MCLELLAND, C.J. in Eq., closely examined the loan contracts and the provisions of the *Moneylenders & Infants Loans Act* (*N.S.W.*) 1941-1948, and held that all the contracts for the repayment of the money lent and all the securities were unenforceable. Following *Kasumu's Case,* His Honour held that the prohibition on enforcement under the Act is not confined to the assertion of rights by means of, or in the course of, judicial proceedings but extends to enforcement by extra-judicial remedies authorized or allowed by the security or by the general law. In *White's Case* the lender, having in the circumstances no right to do so, had entered into possession of the mortgaged property and threatened to take possession of the personal chattels situated there and exercise rights and remedies under the unenforceable securities. Therefore, His Honour concluded:[19]

"These circumstances are, I think, sufficient to give this court jurisdiction to grant relief by way of injunction without any question of the imposition of terms requiring restoration, and the court having this jurisdiction there is jurisdiction also to make an appropriate declaration under s. 10 of the *Equity Act,* 1901."

In coming to this conclusion His Honour relied on what was said by DIXON, C.J., at p. 451 of the *Mayfair Trading Co. Case.* His Honour then proceeded to grant part of the equitable relief asked for: he made a declaration that each of the loan contracts was unenforceable and declared he would grant an appropriate

[17] (1929), 43 C.L.R. 334.

[18] (1927), 40 C.L.R. 357.

[19] [1961] N.S.W.R. at p. 1179.

The Australian Lawyer, October, 1961.

injunction and make an order for repayment by the defendant of the moneys received by it after entering into possession of the mortgaged premises. His Honour, however, refused to make an order for delivery up of the securities since the plaintiffs would not accept a conditional order and this is the crux of the matter. Despite their refusal to do equity by repaying the loan moneys, the plaintiffs were granted some equitable relief to protect their property but were denied an order for the return of the security documents. It is true that the words of DIXON, C.J., relied on by His Honour would appear to give some support for this distinction. However, on several occasions in the course of his judgment, DIXON, C.J., refers to the continuing authority of *Langman* v. *Handover* in N.S.W. After discussing *Kasumu's Case*, DIXON, C.J., says:[20]

"The judgment (in *Kasumu's Case*) does not refer to the basal considerations determining in a court of equity the plaintiff's equitable title to relief, the considerations governing the decision of this Court in *Langman* v. *Handover*, and no doubt that decision will continue to govern the Supreme Court of New South Wales in its equitable jurisdiction. It may be safely assumed that the Supreme Court of Nigeria was regulated in its jurisdiction and procedure by provisions based upon the judicature system."

One may, perhaps, be pardoned for doubting whether it is a proper view of *Kasumu's Case* to hold that the existence of the judicature system is a pre-condition for its applicability. Such doubts are strengthened by an examination of the judgments in *Langman* v. *Handover*. For example, KNOX, C.J., remarked in that case:[21]

"I adhere to the principle on which *Lodge's Case* was decided, namely, that where a borrower seeks equitable relief in respect of a transaction void under the Moneylenders Act it is incumbent on him to offer in his statement of claim to do equity."

RICH, J. and DIXON, J. (as he then was) said:[22]

"In each case the borrower's equity must rest on some thing other than the legal right or immunity given by statute. It is the situation created by the statute which gives the innocent party an equity to be restored to his former position. But such a ground of equity involves an offer of restitution."

They referred with approval to the words of LORD SELBORNE in *Jervis* v. *Berridge*:[23]

"There are indeed certain cases where a defendant has incurred forfeitures or penalties, or where the controversy relates to usurious or other unlawful transactions in which the whole *locus standi in curia* of the plaintiff is dependent on an election which must be declared by the bill, to forego legal rights for the sake of equitable remedies."

[20] (1958), 101 C.L.R. at p. 454.
[21] (1929), 43 C.L.R. at p. 342.
[22] (1929), 43 C.L.R. at p. 356.
[23] (1873), 8 Ch. App. at p. 358.

It is clear that the whole basis of this aspect of *Langman* v. *Handover* is that the Court of Equity will not intervene in aid of a party who escapes from obligations, which he voluntarily incurred, because his contract is illegal or unenforceable, unless he himself offers to do equity in accordance with the settled principles of that jurisdiction. Yet in *White's Case* the plaintiffs were given some equitable relief but not an order for delivery up although there was no offer to do equity. Is this a logical result? There is nothing in *Langman* v. *Handover* to suggest that a plaintiff must do equity to obtain some equitable remedies, but need not do equity to obtain other equitable remedies. It would seem that, in fact, this aspect of *Langman* v. *Handover* has been overruled by *Kasumu's Case*. In *White's Case*, therefore, His Honour has possibly fallen into error in attempting to follow the narrow path suggested by DIXON, C.J., in his judgment in the *Mayfair Trading Co. Case*. If *White's Case* goes to the Privy Council it will be interesting to see whether the Judicial Committee approves His Honour's attempt, aided by the *obiter dicta* of DIXON, C.J., to strike a balance in N.S.W. between the competing authorities of *Kasumu's Case* and *Langman* v. *Handover*.

It is possible that in some circumstances the borrower may be able to recover his security documents by a common law action in detinue.[24] Here the distinction between an "illegal" and an "unenforceable" contract may be relevant. If the contract is illegal the plaintiff may be met by the principle *ex turpi causa non oritur actio*, and if the parties are equally at fault, the maxim *potior est conditio possidentis* may operate in favour of the defendant and prevent the recovery by the plaintiff of the documents. But the plaintiff may recover if, in order to establish his claim to the documents, he does not have to disclose that he entered into the illegal contract so that the action appears to arise *ex turpi causa*. As DU PARCQ, L.J., stated in *Bowmakers Ltd.* v. *Barnet Instruments Ltd.*:[25]

"In our opinion a man's right to possess his own chattels will as a general rule be enforced against one who, without any claim of right, is detaining them, or has converted them to his own use, even though it may appear either from the pleadings, or in the course of the trial, that the chattels in question came into the defendant's possession by reason of an illegal contract between himself and the plaintiff, provided that the plaintiff does not seek, and is not forced, either to found his claim on the illegal contract, or to plead its illegality in order to support his claim."

There is some authority for the proposition that if the plaintiff is a person for whose protection the illegality of the contract has been created, he would be entitled to succeed even though relying on the illegal contract.[26] This proposition would, *a fortiori*, seem to apply if the contract was not illegal but merely unenforceable at the suit of the defendant.

[24] *Halsbury's Laws of England*, 2nd Ed., Vol. 33, at p. 79.
[25] [1944] 2 All E.R. 579 at p. 582.
[26] For example, *Lodge* v. *National Union Investment Co.*, [1907] 1 Ch. 300 at p. 306.

The Australian Lawyer, October, 1961.

Usually the common law action of detinue will not provide a solution to the borrower's problems. Where there has been a written assignment or transfer in favour of the lender the intervention of equity is required. Acting *in personam*, the court in its equitable jurisdiction can order the cancellation of instruments or the reassignment of interests. In most cases which arise in practice involving an unenforceable loan transaction such an order would merely be part of the total relief sought in the proceedings. However, since in *White's Case* it was held that in order to obtain an order for delivery up for cancellation of the securities the plaintiff must offer to do equity, this aspect assumes great importance as the possible lever by which the lender might "enforce the unenforceable". It remains to be seen whether, in the words of McLELLAND, C.J. in Eq., the situation will "be clarified if this suit goes further".[27]

[27] [1961] N.S.W.R. at p. 1182.

LETTER TO THE EDITOR

Dear Sir,

The *Tozer Kemsley Case*, [1961] N.S.W.R. 485 and subsequent cases which, no doubt, have been sympathetically detonated by it (see *White* v. *Pacific Acceptance Corporation* (1961), 34 A.L.J. 365, and *Cornish* v. *Lloyd*, [1961] N.S.W.R. 458) appear to have caused understandable alarm amongst financiers and their legal advisers in N.S.W. In view of the *Mayfair Case* (1958), 101 C.L.R. 428, which originated in Western Australia over two years before, this is perhaps surprising, because since that case the writing has been on the wall for all to see, and it was only a matter of time before the rot would inevitably spread. In regard to the effect of a faulty or non-existent memorandum of contract of loan the Money Lenders Acts of the various States are much the same. The result is commonly an unenforceable contract. Apart from registration as a money-lender, it is the rate of interest charged which brings most lenders into the net. Lending at a rate exceeding, in N.S.W. 10 per cent, and in W.A. 12½ per cent, is sufficient to qualify as a money-lender under the Act, and the penalty for failure to provide a proper memorandum of contract of loan is (or was in W.A.) the loss of both principal and interest. For this reason the *Mayfair Case* in W.A. cost the lender £20,000 in irrecoverable principal. Now, in N.S.W. in similar circumstances, Tozer Kemsley's loss was £31,733 and Pacific Acceptance lost £62,500. No doubt other cases are pending or in contemplation, and no lawyer who has acted for a finance company in a loan transaction can feel completely at ease. Even the specialist in such transactions often finds complexities in the Acts; and the calculations required to arrive at the rate of interest for the purposes of the Acts are a mystery which often causes experts to produce differing answers. All this means that finance companies and their legal advisers are engaged in a highly hazardous business.

In Western Australia and some other States, practitioners have never had the benefit of an escape section, such as is to be found in the New South Wales Act, providing that a deficient memorandum of contract can still be good if the court is satisfied that the error was not of such a nature as to be liable to mislead or deceive any person to his prejudice. However, the recent case of *White* v. *Pacific Acceptance Corporation* (*supra*) shows that a slight miscalculation in the rate of interest will not be assisted by the escape section and thus it appears to be of little practical benefit. Few will disagree that these Acts are anachronistic and have no place in modern society. Usurious lending can be dealt with in other ways than by imposing the penalty of irrecoverability. The Acts are now the refuge of the unscrupulous borrower rather than a shield for the oppressed. In the interests of justice and reason amendment of the law is overdue.

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* Since this letter was received it has been announced that the Parliament of New South Wales intends to introduce amending legislation.

The Victorian Parliament did something to alleviate the situation by a 1959 amendment which excluded from the Act any loan bona fide secured on land and exceeding £5,000. This, however, is a very limited reform. As other States will no doubt be seeking ways and means of altering the law, it may be of interest to mention what has been done in Western Australia.

Following the *Mayfair Case*, there were instances of repudiation of obligations to small investors, some of whom were widows and retired people who had lent to firms or companies following high pressure advertising for deposits at attractive interest rates. These rates were sufficient to bring the deposits within the Act and make them subject to legalized forfeiture owing to the absence of memorandum of contract of loan. The Law Society of W.A. took the lead in approaching the Government and suggesting amendments to the Act. These were accepted by the Government and passed by Parliament in late 1959. The amendments were relatively simple, but, at the same time, effective in removing the worst feature of the Act, namely, unenforceability, and replacing it by a penal provision for default.

Section 9 of the W.A. Act (corresponding with s. 22 of the N.S.W. Act) was repealed and replaced with a new section which makes it an offence (the penalty is a fine not exceeding £250) for a money-lender not to supply the borrower with a memorandum of contract of loan and a copy of the document of security before the loan is made. It should be noted, however, that the maximum interest which a money-lender is permitted to charge in W.A. is 15 per cent, and this whether he is registered or not. The Act automatically reduces any excess rate to 15 per cent. For this reason, it could be said that the harshness of the old s. 9 was never justifiable. Furthermore, the provision in the Act allowing the reopening of money-lending transactions by the Court is adequate to ensure relief against harsh or unconscionable dealings. In the result a contract of loan is no longer unenforceable. A breach of the section requiring a memorandum of contract is an offence under the Act but there are no other consequences. The lender is now able to enforce his contract subject only to the right of the borrower to apply for a reopening of the transaction.

With the present trend towards uniformity in State laws affecting the business community throughout the Commonwealth, e.g., hire purchase and company law, some attention to the Money Lenders Act on a uniform and sensible basis could well be given by the Federal and State Governments.

Yours faithfully,

P. R. ADAMS,

Perth, W.A.

NEGLIGENCE AND REMOTENESS (I)*

by

G. H. L. FRIDMAN

LORD WRIGHT once remarked that it might be possible to put the principle of negligence in a nutshell but difficult to keep it there. The reason for this was that any attempt to explain liability for the tort of negligence involved a reference to, and discussion of two important matters: duty and proximate cause, themselves necessitating the investigation of a congeries of problems. The one common factor of both these matters was the idea of foresight of harm, the importance of which has recently been stressed by the Privy Council in *Overseas Tankship (U.K.) Ltd.* v. *Morts Dock & Engineering Co., Ltd.*, [1961] 1 All E.R. 404.

The reason why the discussion of the extent to which a negligent person will be liable for the consequences of his negligence was so complicated was because the concept of "remoteness" in relation to negligence liability was used in the two different contexts of duty and proximate cause. For, sometimes the Courts preferred to relegate the question of remoteness to the issue of causation of consequences, at others they were prepared to discuss it in conjunction with the problem of duty. Hence, as will be seen, the confusion which arose between two views on the subject of remoteness in relation to negligence. One was that direct consequences could never be remote: the other that only foreseeable consequences involved liability for their occurrence. The conflict between these views, which resulted from the discussion of remoteness in two distinct contexts, has been resolved by the decision in the *Overseas Tankship* case. To appreciate what that conflict was, however, and how it has been affected by the recent judgment, it is necessary to discuss separately the problems of duty and proximate cause.

Duty

The basis of the tort of negligence is the moral, or social idea that every person is expected by the law to behave in a way which, without interfering with his own lawful activity, does not cause harm to others, so that if he does cause harm he will be liable therefor. Since nearly every activity carries with it some risk of harm to someone, a necessary qualification is provided by the idea that a risk is only cognizable if it is one which the reasonable man would regard as likely to follow from a contemplated activity. The test is whether the ordinary member of the group to which the individual whose conduct is in question notionally belongs, and which normally carries on the kind of activity in question, would realize that risk is inherent in that kind of activity. Foresight of the possibility of harm is all important, the foresight of people in the group to which the particular individual notionally belongs, i.e., those who are in the position of such a person.

* By courtesy of *The Law Journal*, England.

The Australian Lawyer, October, 1961.

The existence of such a risk, in other words, the foresight of the possibility of harm, results in the imposition of a duty of care upon a particular individual in respect of that risk or possibility of harm. But the question arises whether the scope of such duty is limited by the harm that is expected as being likely, or extends beyond such harm. In this way the question of remoteness becomes relevant in connexion with the problem of duty.

It could be argued that if the individual can foresee the possibility of harm of any kind, he immediately falls under a duty to behave in accordance with the gravity and degree of the risk of harm involved, irrespective of what follows, or to whom the harm is caused. Hence, if he has failed to do what he should have done in view of his knowledge of the risk or his foresight of the possibility of harm, he must be held liable if, in fact, harm results, regardless of whether the harm which actually resulted is the kind of harm which he foresaw might possibly occur, or the person injured is the kind of person he foresaw might be injured. On the other hand it could be argued that he should only be under a duty to guard against the kind of harm which he foresaw, or should have foreseen might possibly result from his failure to respond to the challenge of the risk of the possibility of harm inherent in the activity and known or foreseen, or foreseeable, by him: and thus his duty only extends to persons foreseeably likely to be injured by him.

In *Re Polemis,* [1921] All E.R. Rep. 40 the rule which received judicial approval was that the individual whose conduct is in question will be liable for whatever harm does eventuate from his conduct, even though he could not foresee such harm (as long as his conduct was negligent, i.e., wrongful). On the other hand, in cases like *Woods* v. *Duncan,* [1946] 1 All E.R. 420, it was said that the duty of an individual is to avoid by the taking of reasonable care the kind of harm which he could foresee might result from his conduct, and he will not be liable for unforeseeable harm, nor to those in respect of whom harm was not foreseeable as a consequence of his conduct, in respect of which and of whom no duty of care existed.

Prior to the recent decision referred to above, the *Polemis* approach had been affirmed by several judges: for example, by ASQUITH, L.J., in *Shearman* v. *Folland,* [1950] 1 All E.R. 976 and *Thorogood* v. *Van Den Berghs & Jurgens, Ltd.,* [1951] 1 All E.R. 682, and by HODSON, L.J., in *Wormald* v. *Cole,* [1954] 1 All E.R. 683: see also *Schneider* v. *Eisovitch,* [1960] 1 All E.R. 169. It had not been expressly disavowed by the Courts. But it was inconsistent with the view expressed by POLLOCK, C.B., in *Rigby* v. *Hewitt* (1850), 5 Ex. 240, and *Greenland* v. *Chaplin* (1850), 5 Ex. 243; it was inconsistent with the rules relating to liability for breach of contract enunciated in *Hadley* v. *Baxendale* (1854), 9 Ex. 341; and it had been stated by DENNING, L.J., that it could not survive the decisions in *Donoghue* v. *Stevenson,* [1932] All E.R. Rep. 1, *Bourhill* v. *Young,* [1942] 2 All E.R. 396, *Aldham* v. *United Dairies (London), Ltd.,* [1939] 4 All E.R. 522, and *Woods* v. *Duncan* (*supra*): see *Minister of*

Pensions v. *Chennell*, [1946] 2 All E.R., at p. 721. Moreover, it had led to difficulties in respect of the liability for causing financial loss which was stated by the House of Lords in *The Edison*, [1933] All E.R. Rep. 144. Hence the suggestions by DENNING, L.J., in *Roe* v. *Ministry of Health*, [1954] 2 All E.R. 131, that the extent of a person's liability is to be found by asking the one question: Is the consequence fairly to be regarded as within the risk created by the negligence; and that foreseeability is only to be disregarded when the negligence is the immediate or precipitating cause of the damage.

Proximate Cause

Another way of looking at the problem of liability for negligence is by reference to the idea of proximate cause. This approach involves the consideration of the question whether the individual whose conduct is the subject of inquiry has "caused" the harm for which it is sought to make him liable. The issue is whether his behaviour, from which the harm suffered can be traced in a physical sense, can also be traced in a legal sense. It is clear that what the scientist or non-lawyer generally would regard as a causal connexion between behaviour and consequences cannot always be treated by lawyers as a causal connexion. If that were indeed so, then there would be a cause of action in almost every case, and the limits of an individual's liability would be indefinite. Where, then, is the distinction to be drawn?

The law could make the circle of legal consequence congruent with the circle of factual circumstances. In practice it does not. What test then is applied by the law to determine the extent of the circle of legal consequences? It is in respect of this question that the problem of remoteness is raised in connexion with proximate cause.

There are really two distinct situations. The first is where the harm inflicted is of a different kind from that which might have been foreseen as likely to occur to a given person as a result of undertaking a given activity. Some harm to the person concerned might have been foreseen, but in fact more harm, or a different kind of harm, was suffered by that person. This is the type of case illustrated by the facts of *Re Polemis* and those of the *Overseas Tankship* case.

The second is where harm, or a certain kind of harm, could only be foreseen to a person if a certain intervention, or an additional act or series of acts, took place as a result of the behaviour of someone, or of something else. This is illustrated by cases such as *Carmarthenshire County Council* v. *Lewis*, [1955] 1 All E.R. 565.

The difference between these two types of cases is that in the first the condition which helped to produce the harm actually suffered by the injured person was a *static* one, whereas in the latter type the additional or intervening factor was *dynamic*.

It is sometimes thought that there is a third instance of a "remoteness" situation, namely where it is sought to make an individual liable for the infliction of harm upon persons other than those in respect of whom he might have foreseen that his activity would be likely to cause harm. This, it is suggested, is not really a problem of proximate cause at all. As the cases involving nervous shock show, and as seen from the earlier discussion on risk and duty, it is really a problem relating to the existence, definition and scope of a duty of care (see *Hambrook* v. *Stokes Brothers*, [1924] All E.R. Rep. 110; *Bourhill* v. *Young* (*supra*) and *King* v. *Phillips*, [1953] 1 All E.R. 617).

Remoteness and Directness

Until the decision in the *Overseas Tankship* case the chief difference between the static and dynamic types of remoteness problems lay in the principles to be applied in their solution. This was the result of *Re Polemis*. The rule as stated there was that the individual guilty of wrongful conduct was liable for everything which was a direct result of his behaviour. What is a "direct" result was a difficult question. But is seems to have involved, in part at any rate, the idea that the wrongdoer took his victim as he found him, in the sense that the wrongdoer would be liable for interfering with the state of things as they were, whether or not they were what he thought them to be. Thus in *Re Polemis* the defendants interfered not with a ship, but with a ship full of petrol vapour. Hence they were liable for the total destruction of the ship which resulted when they interfered with it. The exception to this, shown in *The Edison*, was in respect of economic damage or loss, as opposed to physical damage. For the doctrines that the wrongdoer is liable for direct consequences, and takes his victim as he finds him, seem only to have been applied to the victim's earning capacity, not the victim's general economic condition (contrast *The Edison* with *Lee* v. *Sheard*, [1955] 3 All E.R. 777). Hence, everything which was the result of the physical state of the injured party (and in some instances the result of the injured party's economic state) was the responsibility of the wrongdoer, for which he would be liable. In such cases, therefore, the test of liability was directness, not foresight of consequences. Thus, in such cases, a distinction was drawn between, on the one hand, foresight of consequences, which was relevant to the risk involved in some activity, the possibility of harm from such risk, and the resultant existence, definition and scope of a duty of care, and, on the other hand, the physical directness of the consequences of a breach of such duty. This was the distinction drawn in cases such as *Smith* v. *London & South Western Rail Co.* (1870), L.R. 6 C.P. 14, *H.M.S. London*, [1914] P. 72. *Re Polemis* itself, and by LORD SUMNER in *Weld-Blundell* v. *Stephens*, [1920] All E.R. Rep., at p. 46, where it was said: "What a defendant ought to have anticipated as a reasonable man is material when the question is whether or not he was guilty of negligence, that is, of want of due care according to the circumstances. This, however, goes to culpability, not to compensation".

Remoteness and Foresight

By contrast, in cases involving what has here been called the dynamic type of remoteness problem, the test invoked was one of foresight. The problem was to determine when a wrongdoer would be liable where, by himself, he would not have brought about the harm suffered, or would not have damaged the person who was actually injured, although with the addition or intervention of some other human agency, or some natural event, his conduct did suffice to bring about the harm in question.

Whether the case was one of causing the injury or aggravating the injury, the test, before the *Overseas Tankship* case, would appear to have been whether the intervention was foreseeable as a consequence on the part of the wrongdoer whom it is sought to hold liable for the injury in question. Thus, in *Aldham* v. *United Dairies* (*supra*) a foreseeable consequence of leaving the horse unattended for too long a period was that it would get sufficiently testy to attack a passer-by. In *Carmarthenshire County Council* v. *Lewis* (*supra*) a foreseeable consequence of failing to keep the gate locked and so retaining children inside the school was that one or other of them might run out on to the road where they would be a danger to users of the highway, such as the plaintiff's husband, who had to swerve in order to avoid killing some such child and was himself killed in the crash that followed.

Further illustrations of intervention which did not make a consequence too remote, are those where the intervention which should have been foreseen was not that of children or animals, i.e., those incapable of exercising any independent ability to determine what to do, but was that of rational adults, who could be expected to behave in a certain way. Thus, in the old case of *Scott* v. *Shepherd* (1773), 2 W.B1. 892, even rational adults could be expected to throw a lighted squib away when cast at them. Hence a series of such throwings away was to be expected by the defendant when he himself threw a lighted squib into the crowd. In *Stansbie* v. *Troman*, [1948] 1 All E.R. 599, a plumber who left open the front door of a house where he was working should have foreseen that someone might come into the house and steal from it.

The same principles were also applied where the acts of the intervening agency (human or non-human) aggravated an injury already resulting from the original wrongdoer's behaviour (see *Cobb* v. *Great Western Rail Co.*, [1894] A.C. 419, and *Hogan* v. *West Bentinck Collieries, Ltd.*, [1949] 1 All E.R. 588).

The earlier position summarized

Thus, before the decision in the *Overseas Tankship* case, the problem of remoteness sometimes involved the Courts in a consideration of what would, or could be foreseen by the reasonable man, even though the *Polemis* doctrine stressed the importance of direct, or natural consequences. Hence, whether the problem was subsumed under the heading of "duty" or under

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that of "proximate cause", the question was still whether the defendant ought to have foreseen that what did result might result from his behaviour. Admittedly, in certain cases, those dealing with liability for consequences resulting directly, in a physical sense, from wrongdoing, the Courts appear to have decided that foresight of such consequences was irrelevant. These were difficult to reconcile with the general idea of negligence, and the general principles relating to liability for negligent conduct. The effect of this difficulty was to obscure the real meaning of the expression "remoteness" in relation to the tort of negligence. Where other torts were concerned, it was sometimes easier to distinguish between the principles of liability and the principles upon which a wrongdoer would be held liable for the consequences of his conduct.

One example of a tort other than negligence involving liability for direct physical consequences is afforded by *Wormald* v. *Cole* (*supra*), where there was such liability for cattle-trespass. But this may have been because cattle-trespass involves strict liability, i.e., without proof of wrongdoing at all. Hence in such cases there might be less justification for invoking any idea of foresight of consequences as a test of the extent of a wrongdoer's liability. This is a question to which reference must be made later. Before discussing the possible relevance now of foresight of consequences to instances of strict liability, the effect of the decision in the *Overseas Tankship* case upon liability for negligence will have to be considered.

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